THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No.: 2026-001305

Fernesha Mazyck,
as Personal Representative of The Estate of Ida Braggs,..........................Respondent,

v.

THI of South Carolina at Charleston, LLC
d/b/a Riverside Health and Rehab, ...Petitioner.

REPLY TO RETURN TO MOTION TO DISMISS

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ATTORNEYS FOR RESPONDENT

Respondent Fernesha Mazyck, as Personal Representative of The Estate of Ida Braggs ("Respondent"), respectfully submits this reply to Petitioner's return in opposition to Respondent's motion to dismiss the petition for a writ of certiorari and for sanctions pursuant to Rule 269, SCACR. The return confirms the central premise of the motion. Petitioner identifies no intervening authority, no change in the controlling law, and no factual distinction that sets this petition apart from the dozens of matters that preceded it. Instead, the return repackages the same merger and direct benefits estoppel arguments that the appellate courts of this State have considered and rejected again and again on these identical agreements, and it asks this Court to overlook that history on the theory that no court has yet refuted those arguments to Petitioner's satisfaction. That theory has no limiting principle. Under it, no volume of adverse authority could ever render a repetitive filing frivolous, because the filing party could always insist that some nuance of its position remains unaddressed. Rule 269 does not tolerate that result.

The return is also conspicuous for what it does not say. It does not deny that the Court of Appeals has rejected Petitioner's position on these identical agreements in *Solesbee* and in at least two dozen unpublished decisions. It does not deny that this Court has denied certiorari on this very issue at least nineteen times, including nine denials on a single day. It does not deny that the Fundamental entities filed three other petitions advancing the same purely legal arguments on the same day this petition was filed. And it does not identify a single matter, out of the dozens Petitioner and the other Fundamental entities have pursued, in which their merger position has ever prevailed. The conduct of this appeal tells the same story. By the undersigned's count, Petitioner has requested eleven extensions of time in this appeal alone, amounting to 151 days of delay, and each extension has prolonged the halt of the circuit court proceedings on Respondent's wrongful death and survival claims.[1] Those requests cannot be explained by the demands of preparing original work, because the petition and the briefing behind it are in all material respects copied from the briefs filed in the appeals that preceded this one. The return offers no explanation for this record because there is none. The motion should be granted.

ARGUMENT

I. Rule 268(d)(2) and the discretionary nature of certiorari review are no answer to Rule 269.

Petitioner first attempts to erase the record of its own litigation history. It contends that the unpublished decisions of the Court of Appeals cannot be cited under Rule 268(d)(2), SCACR, and that this Court's denials of certiorari, of which there have been at least nineteen, permit no conclusion to be drawn because a denial imports no expression of opinion on the merits. (Return at 5-6). Both contentions miss the point of the motion. Respondent does not cite the unpublished decisions as precedent, and the motion does not depend on any precedential effect of a denial of certiorari. The unpublished decisions and the certiorari denials are cited as facts. They establish how many times the Fundamental entities have presented the identical merger analysis of the identical documents to the appellate courts of this State, how many times that

[1]The figures stated in this reply reflect the status of these matters as of the date of filing. Counsel will update them at argument if the Court requires.

analysis has been rejected, and the notice Petitioner possessed when it filed the instant petition. Rule 269 directs the Court's attention to precisely those facts, because the rule concerns the conduct of the offending party and the discouragement of like conduct in the future.

Rule 268(d)(2) governs the citation of unpublished opinions as precedent for a proposition of law. It does not render a party's documented history of repetitive, unsuccessful filings invisible when a court is asked to determine whether the latest such filing is frivolous or taken for delay. Courts confronted with serial filings routinely consider that history. *See McKinzy v. Kansas City Power & Light Co.*, 367 F. App'x 912, 913 (10th Cir. 2010) (finding an appeal frivolous and dismissing it where appeal presented arguments rejected by the court on two prior occasions within six months and where appellant could not distinguish those decisions from the issues on appeal). The Supreme Court of the United States, the very source of the principle Petitioner borrows from *United States v. Carver*, 260 U.S. 482, 43 S. Ct. 181, 67 L. Ed. 361 (1923), has repeatedly sanctioned and restricted litigants who refile requests for relief on legal bases identical to those presented in prior petitions for certiorari, notwithstanding that no single denial expressed any view of the merits. *See In re Sindram*, 498 U.S. 177, 179-80, 111 S. Ct. 596, 597, 112 L. Ed. 2d 599 (1991) (per curiam) (stating that "[t]he goal of fairly dispensing justice, however, is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests" where the petitioner recited the same claims he had presented to the Court in over a dozen prior petitions); *see also In re McDonald*, 489 U.S. 180, 184, 109 S. Ct. 993, 996, 103 L. Ed. 2d 158 (1989) (per curiam) (noting that the Court's responsibility is to see that its resources are allocated in a way that promotes the interests of justice, which are not served by repetitious and frivolous petitions); *Martin v. D.C. Court of Appeals*, 506 U.S. 1, 3, 113 S. Ct. 397, 398, 121 L. Ed. 2d 305 (1992) (per curiam) (same).[2] If Petitioner was correct, the absence of precedential effect would operate as a license for infinite repetition, and no denial of certiorari, however many times repeated, could ever inform the frivolousness inquiry. Nothing in *Carver*, which addressed only the weight of a denial as authority *on the merits of a legal question*, suggests any such license.

In any event, the motion does not rest on the unpublished decisions or the certiorari denials alone. *Solesbee* is a published, binding decision of the Court of Appeals. It construed the same admission agreement and the same arbitration agreement now before the Court and held that the two documents do not merge. *Est. of Solesbee v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 648-49, 885 S.E.2d 144, 149 (Ct. App. 2023). This Court has repeatedly denied certiorari to review that published holding. The Court of Appeals then applied *Solesbee* in this case, affirmed, and denied rehearing. Even if every unpublished decision and every denial of certiorari were disregarded entirely, the result below was dictated by published, controlling precedent construing these very documents. That alone makes

[2]The cited decisions involved pro se litigants who were not subject to the financial considerations that ordinarily deter frivolous filings. The concern they express applies with greater force to a well resourced institutional litigant represented by counsel, for whom the cost of repetitive appellate filings is simply an expense that purchases years of delay in every underlying case.

the result of this petition obvious. *See Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988) ("An appeal is frivolous if the result is obvious . . . .").

II. Petitioner's insistence that *Solesbee* left gaps for its arguments confirms the frivolousness of the petition rather than curing it.

The heart of the return is the contention that *Solesbee* was wrongly decided and incompletely reasoned, leaving unanswered questions through which, in Petitioner's words, its position still fits. (Return at 7). These are not new arguments. Petitioner's counsel represented the appellants in *Solesbee* itself and pressed the same points there. Counsel pressed them again before the circuit court in this case, again before the Court of Appeals in this case, again on rehearing, and again in the string of related matters reflected in the exhibits to the motion. Every court to consider them has rejected them. The Court of Appeals affirmed in this case with Petitioner's purported gaps fully briefed before it, and this Court has declined at least nineteen times to disturb the line of decisions Petitioner attacks.

A settled issue does not remain perpetually open merely because no opinion has refuted every subsequent alternative formulation of the losing argument sentence by sentence. Appellate courts routinely affirm under controlling precedent without cataloguing each variation of a rejected theme, and litigants are not thereby licensed to relitigate the theme infinitely. Frivolousness is measured objectively, and a litigant's subjective hope that a court will finally draw different conclusions from the same documents is not a defense where "no reasonable, good-faith argument" exists "for the extension, modification, or reversal" of clearly established precedent. *Coghlan*, 852 F.2d at 808-09, 814-15.

Sanctions are appropriate when the petitioner cannot reasonably harbor a good faith belief that a court would reconsider arguments it has repeatedly rejected. *See In re Becraft*, 885 F.2d 547, 548-49 (9th Cir. 1989) ("[T]he result of the petition for rehearing was even more obvious than the initial appeal."). The General Assembly has codified the same objective standard for proceedings in the lower courts, requiring sanctions where a reasonable attorney in the same circumstances would believe a claim is clearly not warranted under existing law, that no good faith or reasonable argument exists for the extension, modification, or reversal of existing law, or that the claim is interposed merely for delay. S.C. Code Ann. § 15-36-10 (Supp. 2025). By any of those measures, the time for pressing these arguments has long since passed.

Petitioner's reliance on the merger presumption recited in *Coleman* does not advance its position. *Coleman* itself applied that "presumption" and found it overcome, holding that the contracts by their own terms indicated an intent that the common law doctrine of merger not apply and that any ambiguity in the relevant clause is construed against the drafter. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355-56, 755 S.E.2d 450, 455 (2014). In other words, the text of contracts can serve as evidence itself of an intent contrary to merger. *Hodge* and *Thompson* reached the same result on materially identical nursing facility documents. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562-63, 813 S.E.2d 292, 302 (Ct. App. 2018) (noting that the language of an agreement recognized "on its face" "separatedness" and not merger); *Thompson v. Pruitt Corp.*, 416 S.C. 43, 52-53, 784 S.E.2d 679, 684-85 (Ct. App. 2016) (same). *Solesbee* reached the same result on the very documents at issue here. *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. Petitioner's arguments were likewise presented to and rejected by the circuit court in this case, which found that the language of the agreements evinced an intent contrary to merger.[3] (November 15, 2024 Circuit Court Order at 3). The Court of Appeals affirmed. Petitioner's quarrel is not with an unaddressed gap. It is with the outcome, and the outcome has been uniform for years.[4]

Nor did Respondent's counsel concede anything of consequence at the hearing in the related matter *Kilpatrick v. Pruitthealth-Ridgeway, LLC*, Case No. 2026-001309. Read in full, counsel's statement was that the appellate courts have held that these agreements do not merge and that no court has ever found that they do, even if the courts have not recited every formulation of Petitioners' argument in reaching that holding. (Pet'r's Return, Ex. 5 Hr'g Tr. p. 21, line 1-12). Recasting a rejected position in new packaging does not create a nonfrivolous argument, and it is the dispositive holding, not the packaging, that controls. Petitioner's own counsel was

[3] The record is conspicuously void of any evidence that the arbitration agreement was part of Petitioner's "other Admission materials" as that term has been defined by Petitioner in its admission documents.

[4]Petitioner's footnoted disagreement with the articulation of direct benefits estoppel in *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020), and its fidelity to *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), is nothing more than smoke and mirrors. *Wilson* recognized that direct benefits estoppel does not apply when the plaintiff's claims arise from general common law principles and not contractual duties. *Id.* at 341-42, 827 S.E.2d at 175-76. Regardless, under any formulation, the doctrine requires that the nonsignatory receive a direct benefit from the contract containing the arbitration clause. Absent merger, the arbitration provision is not contained within the admission agreement, and the Estate, which asserts only common law tort claims and seeks to enforce no provision of either document, receives no direct benefit from any contract containing an arbitration clause. The estoppel question is never reached, which is why the merger issue is dispositive. Petitioner's protest that it has not yet been heard on the point rings hollow, as it briefed the issue to the Court of Appeals by its own account and that court affirmed with the briefing before it. (Return at 6 n.10).

considerably more candid at that same hearing. He acknowledged that the admission agreement and arbitration agreement in this case are the same documents that were at issue in *Solesbee*, described Petitioner's effort as threading the needle, and conceded that Petitioner recognized the headwinds and was nonetheless attempting to chart a course past them. (*Id.* at p. 9, lines 12-17, p. 27, line 17 - p. 29, line 13). An appeal that its own proponent describes in those terms, taken after dozens of uniform rejections, is an appeal whose result is obvious and whose arguments are wholly without merit.

Petitioner's invocation of Rule 3.1, RPC, Rule 407, SCACR, proves too much. A good faith argument for the modification or reversal of existing law may justify presenting a settled question to an appellate court once, or perhaps even twice. It cannot justify presenting the same question, on the same two documents, dozens of times over more than five years in the face of uniform rejection. At some point the repetition itself refutes the claim of good faith, and that point was passed long ago. The return's wholesale incorporation by reference of the petition and the appellate briefs changes nothing, because repeating rejected arguments in additional filings does not lend them merit.

III. The Court of Appeals' denial of earlier motions does not insulate this petition from Rule 269.

Petitioner leans heavily on orders of the Court of Appeals declining to dismiss four earlier appeals in response to similar motions. (Return at 1, 10). Those orders do not carry the weight Petitioner assigns to them. First, they were rulings of the Court of Appeals on motions directed to interlocutory appeals then pending in that court.

The instant motion is directed to this Court and concerns a petition for discretionary review. As Petitioner emphasizes, a writ of certiorari is "not a matter of right, but of sound judicial discretion." Rule 242(b), SCACR. Whatever residual plausibility Petitioner believed its appeal of right retained, a petition asking this Court to exercise its discretion to take up the same settled question it has declined to review at least nineteen times stands on markedly different footing.

Second, the landscape has only hardened since the Court of Appeals denied those motions. The Court of Appeals has since issued at least six decisions affirming that these agreements do not merge, this Court has denied at least four more petitions raising the identical issue, and the Court of Appeals affirmed in this very case under the controlling precedent and denied rehearing. The frivolousness of the instant petition is assessed on the record as it stood when the petition was filed, and every data point in that record pointed to the same obvious outcome. Third, the Court of Appeals' forbearance is not an endorsement of the merits of Petitioner's position. That court went on to reject Petitioner's arguments and to affirm the circuit court. A tribunal's decision not to impose sanctions at one stage does not preclude a contrary determination at the next. *See Freeze v. Griffith*, 849 F.2d 172, 176 (5th Cir. 1988) ("That the district court did not find appellant's charges so redundant and frivolous as to warrant sanctions does not preclude a contrary decision on appeal.").

IV. Petitioner's refusal to accept the settled decisions of the Court of Appeals undermines the unified judicial system of this State.

The judicial power of this State is vested in a unified judicial system that includes both this Court and the Court of Appeals. S.C. Const. art. V, § 1. *See* S.C.

Code Ann. § 14-8-10 (Supp. 2025) (providing that the Court of Appeals is a part of the unified judicial system). The Court of Appeals commenced operation on September 1, 1983, because the appellate docket of this Court had become congested to the point that litigants were waiting years for the final resolution of their appeals. The people of this State approved a constitutional amendment in 1984 making the Court of Appeals a permanent constitutional court, and the General Assembly ratified that amendment in 1985. The court was created to expedite the administration of justice. It resolves the great majority of the appeals filed in this State so that this Court may devote its resources to the questions that most require them, and its published decisions supply litigants and the trial courts with settled, authoritative statements of the law.

Petitioner's position in this litigation cannot be reconciled with that design. Petitioner insists that no question is settled in this State unless and until this Court grants review and publishes an opinion of its own, and that a published decision of the Court of Appeals therefore binds no one who is determined to keep litigating. Carried to its logical end, that position converts the Court of Appeals into an advisory body. Every question the court decides would remain open indefinitely, every published opinion would invite relitigation rather than reliance, and the docket relief the court was created to provide would be undone by the very litigants who consume the most of its resources. The Rules reflect the opposite understanding. Published opinions of the Court of Appeals appear in the Official Reports and carry precedential force, in contrast to memorandum opinions, which have none. Rule 220(a), SCACR.

A party who believes existing precedent should be overruled has an orderly mechanism for making that argument. Rule 217, SCACR. Within the unified system, the decisions of this Court bind the Court of Appeals as precedents. S.C. Const. art. V, § 9. The published decisions of the Court of Appeals in turn state the law of this State for the trial courts and the litigants who appear before them unless and until this Court modifies or overrules those decisions.

Respondent does not suggest that a litigant may never seek certiorari from an adverse published decision. The Fundamental entities did exactly that in *Solesbee*, and this Court declined review. What the unified system does not tolerate is what has happened since. Petitioner and the affiliated Fundamental entities have treated every adverse decision of the Court of Appeals as a nullity, presenting the same rejected question anew in case after case on the theory that the judgments of the intermediate court count for nothing until this Court speaks. That posture evidences a disregard for the constitutional role of the Court of Appeals and a contempt for the finality its decisions are meant to provide. It undermines the appellate structure the people of this State adopted and the efficient administration of justice the unified system exists to secure, and it independently supports the imposition of sanctions under Rule 269.

V. The return corroborates, rather than rebuts, the evidence that this appeal was taken for delay.

Rule 269 authorizes sanctions where a filing is frivolous or is taken solely for the purposes of delay, and the motion set forth the evidence of delay in detail. The return answers none of it. Petitioner does not deny the tally of rejected appeals and petitions. It does not deny the mass denial of nine petitions on October 30, 2024. It does not deny that three additional petitions advancing the same purely legal arguments were filed on the same day as this one. It does not identify any matter in which its merger position has ever succeeded. Silence in the face of that record is telling.

The conduct of this appeal supplies further corroboration. Petitioner has requested eleven extensions of time in this appeal alone, amounting to 151 additional days of delay. Each request came at a procedural juncture where Petitioner was required to act, and each prolonged the stay of the circuit court proceedings on Respondent's wrongful death and survival claims. Nor can the requests be justified by any need to prepare original work. Petitioner's briefing in this appeal is a near verbatim copy of the briefing the Fundamental entities have filed in appeal after appeal, reciting the same arguments, the same authorities, and in large measure the same language. A party that files what is essentially the same brief each time has no need of serial extensions to prepare it. The extensions purchase nothing except additional delay. Delay is not an unfortunate byproduct of these filings. It is their function. An interlocutory arbitration appeal, followed by a petition for certiorari, halts the underlying litigation for years regardless of its outcome, and Petitioner has captured that benefit in this case and in dozens of others while advancing arguments destined to fail. The sanctions requested in the motion, including an award of attorney's fees and costs without the cap imposed by Rule 222, SCACR, the trebling of that award, and a fine payable to the Court, remain necessary to make the strategy of attrition unprofitable and to deter its repetition. More than ten days have elapsed since service of the motion, and the notice requirement of Rule 269 is therefore satisfied.

CONCLUSION

The return asks this Court to treat the latest presentation of a question answered dozens of times as if it were the first. For the foregoing reasons and those stated in the motion, Respondent respectfully requests that the Court deny the petition for a writ of certiorari, dismiss this appeal, and impose pecuniary sanctions on Petitioner sufficient to deter the recurrence of this conduct. Respondent renews its request that the Court hold any remaining deadlines in abeyance until the Court has ruled on the motion.

Respectfully submitted,

By: _*/s/John E. Parker, Jr.*___________

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